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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MANDREL MILLER,

Defendant and Appellant.

B211483

(Los Angeles County
Super. Ct. No. SA055388)

APPEAL from a judgment of the Superior Court of Los Angeles County.

James R. Dabney, Judge. Affirmed.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Ryan M. Smith, Deputy Attorney General, for Plaintiff and Respondent.

* * * * *

Mandrel Miller appeals from the judgment imposed after he pled no contest to one count of second degree robbery (Pen. Code, § 211)¹ and admitted personally using a firearm in the offense (§ 12022.53, subd. (b)). Appellant also admitted suffering a prior serious felony conviction of vehicular manslaughter (§§ 192, subd. (c)(1), 667, subd. (a)(1)), and a prior juvenile “strike” adjudication of second degree robbery (§§ 667, subd. (d)(3), 1172.12, subd. (b)(3)).

Sentenced to a term of 21 years, appellant contends that (1) his prior manslaughter conviction did not factually qualify as a serious felony conviction under section 667, subdivision (a)(1), and (2) his juvenile prior could not constitutionally constitute a strike. We find these contentions unavailing, and affirm the judgment.

FACTS

The evidence at the preliminary hearing showed that on February 11, 2005, appellant and an accomplice entered a cellular phone store in Hawthorne, inquired about phones, and left. They returned 20 minutes later. Appellant pointed a gun at an employee behind the counter, and said, “You know what we’re here for.” Appellant’s accomplice asked where the phones and money were. He took five cell phones from a cabinet, and a second employee gave him about \$100 cash from a cash box. The accomplice then ordered the employees, and a customer and a visitor, into a back room, and he and appellant departed.

An amended information charged appellant with two counts of robbery, and alleged that he used a firearm in each count. As to both counts, the information also alleged that appellant had suffered three prior strike convictions, comprising a 2000 conviction of vehicular manslaughter under section 192, subdivision (c)(1), and two concurrent juvenile court adjudications of robbery, in 1995. The information further alleged that the prior convictions and adjudications had been for serious felonies, pursuant to section 667, subdivision (a)(1). In addition, it was alleged that appellant had

¹ Undesignated section references are to the Penal Code.

served a prior prison term, within the meaning of section 667.5, subdivision (b), for the vehicular manslaughter conviction.

Appellant filed a motion to dismiss the allegation of his juvenile adjudication as a strike, on the ground the adjudication had been unconstitutionally rendered without the right to a jury trial. The motion stated that appellant had admitted the underlying allegation in juvenile court.

Appellant later filed a supplement to this motion. Concurrently, he moved to dismiss the allegation of his vehicular manslaughter conviction, as a strike and as a prior serious felony, on statutory and evidentiary grounds. Appellant noted that a violation of section 192, subdivision (c)(1) would constitute a serious felony under section 1192.7, subdivision (c) (and hence section 667, subdivision (a)(4)) if it involved personal infliction of great bodily injury, on a non-accomplice. (§ 1192.8, subd. (a).) Appellant insisted that those facts had not been and could not be shown. Appellant also attached and cited the transcript of his 2000 no contest plea to the vehicular manslaughter charge. There, in response to appellant's inquiry after entering his plea, both the court and the prosecuting and defense attorneys had expressed the opinion that the conviction would not constitute a strike.

With respect to the circumstances of the prior offense, the plea transcript reflected that appellant had stated to the court, "I don't feel like I killed my girlfriend. I feel like it was a car accident." In its opposition to the motion regarding the manslaughter, respondent stated that appellant had personally inflicted great bodily injury "when he was involved in a speed contest, driving at an unsafe speed of at least 80mph in a 50mph zone, and collided into a fence/wall, resulting in the death of his passenger." Respondent further asserted that the victim had not been an accomplice, as appellant had full control of his car and chose to engage in the speed contest. Respondent did not cite any source for these statements.

At the September 22, 2006 hearing on appellant's motions to dismiss, the court denied the motion to dismiss the juvenile strike prior, but did dismiss the strike allegation as to the vehicular manslaughter prior. The court did so on grounds of estoppel and

fairness, in view of the prosecutor's agreement in the prior case that the conviction would not constitute a strike. The trial court, however, also opined that the prior did involve personal infliction of great bodily injury.

On November 9, 2006, the date set for trial, appellant accepted a plea offer by the prosecution, under which he would plead guilty to one count of robbery and admit certain of the charged enhancements, and receive a 21-year sentence. As the court explained it, appellant would plead guilty to count 1, and admit "the strike allegation as alleged in the information pursuant to 1170.12 (A) through (D), as well as the five-year prior under 667(A) through (1) [*sic*], and the personal use allegation of the firearm within 12022.53." Appellant would receive "the midterm, doubled because of the strike, for six years, plus five years for the five-year prior, and ten years for the gun, for a total of 21 years in state prison."

Appellant's attorney then asked to "preserv[e] the legal arguments regarding the priors." He explained, "Obviously, by the admissions he's admitting that factually he suffered those convictions and that permits the court to proceed with the sentence. But the arguments we've raised regarding whether those priors actually qualify, that" The court responded that appellant could submit a request for certificate of probable cause (§ 1237.5), which the court would grant regarding the juvenile strike issue, but probably would not grant as to the issue of whether the vehicular manslaughter was a serious felony conviction.

After further admonitions, appellant pled no contest to robbery, and admitted the enhancing allegations. As to prior strikes, he admitted that "[a]s to the 1170.12 (A) through (D) and 667 (B) through (I) allegation," that he "had a sustained juvenile petition for second degree robbery in . . . [1995]." And as "to the allegation pursuant to . . . [¶] . . . [¶] 667(A)," appellant admitted he had suffered "a conviction for Penal Code section 192(c)(1), . . . on August 31, 2000, as alleged in the information."

Appellant was sentenced on July 29, 2008.² At that hearing, appellant argued that his prior conviction under section 192, subdivision (c)(1) necessarily involved conduct proximately causing death, but not personally inflicting it. The latter, appellant argued, would occur where a motorist struck a pedestrian, or another vehicle. “But,” counsel continued, “here what’s happening is that the person who’s in the car with [appellant] as a passenger is not – he is not inflicting it through his hitting this person with his car. And the result of hitting the wall is that . . . a person inside his car is injured. That’s a proximate cause analysis, is my argument, and it’s not a personal infliction analysis.”³

The trial court rejected this argument, stating in part that the passenger’s death as described was as directly inflicted by appellant’s conduct as if the victim had been standing in front of the vehicle or had been in another, impacted vehicle. The court indicated, however, that it would grant a certificate of probable cause concerning the issue. The court also observed that it had no power to dismiss the section 667, subdivision (a)(1) enhancement. (§ 1385, subd. (b).)

Appellant was sentenced in accordance with the previously indicated disposition. The court thereafter granted appellant’s request for a certificate of probable cause, with respect to both the juvenile strike question and the use of the vehicular manslaughter conviction, which the court had dismissed as a strike, as a prior serious felony enhancement.

DISCUSSION

1. The Vehicular Manslaughter Prior.

With respect to the qualification and use of his 2000 vehicular manslaughter conviction as a prior serious felony conviction, appellant asserts two contentions. Neither has merit.

² Sentencing was extensively postponed because of appellant’s need for surgery.

³ A moment earlier, counsel stated, “[I]n this situation where Mr. Miller’s driving, and he’s speeding, he slams into a – slams into a wall, the result is his passenger dies”

Appellant first contends that the same equitable principles that led the trial court to dismiss the manslaughter conviction as a strike should have precluded the court from treating the conviction as a serious felony conviction. The contention is not persuasive. The trial court deemed it inequitable to employ the prior conviction as a strike, after the prosecution as well as the court had told appellant at the time of his 2000 plea that it would not constitute a strike. But neither the prosecutor nor the court then said anything about the conviction's potential status and use as a prior serious felony enhancement. Moreover, although the court in the present case dismissed the strike allegation under its authority to do so in furtherance of justice (§ 1385, subd. (a); *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497), the court possessed no such authority with respect to the serious felony enhancement allegation. (§ 1385, subd. (b).)

Appellant's second contention is that respondent failed to prove the facts necessary to render appellant's vehicular manslaughter conviction a serious felony conviction, namely that in committing the offense appellant personally inflicted great bodily injury on a nonaccomplice (§§ 1192.7, subd. (c)(8), 1192.8, subd. (a)), in addition to the inherent element of proximately causing death. (§ 192, subd. (c)(1); see *People v. Rodriguez* (1999) 69 Cal.App.4th 341, 347-349.)

The short but proper answer to this contention is that it is foreclosed by appellant's admission of the enhancement allegations of the amended information when he pled no contest. The pleading alleged, "pursuant to Penal Code section 667(a)(1)," that as to each count appellant had suffered three prior convictions of a serious felony, including the 2000 vehicular manslaughter conviction. As noted above, appellant admitted that as to "the allegation pursuant to" section 667, subdivision (a), he had suffered the 2000 conviction under section 192(c)(1), "as alleged in the information." This admission "that his prior conviction constituted a serious felony conviction" was and remains binding on appellant. (*People v. Bow* (1993) 13 Cal.App.4th 1551, 1558.)

Indeed, in seeking to avoid his admission, appellant is attempting to improve upon the bargain that he undertook, and that afforded him the advantage of not facing a second count. And his argument that he "preserved" his evidentiary challenge to the

enhancement while admitting it, through a certificate of probable cause, is unsound. Issuance of such a certificate “does not operate to expand the grounds upon which an appeal may be taken” (*People v. DeVaughn* (1977) 18 Cal.3d 889, 896), and evidentiary issues concerning matters admitted by a plea do not constitute such grounds. (*Id.* at pp. 895-896.)

2. The Juvenile Strike Prior.

Appellant’s second contention is that his 1995 juvenile adjudication of robbery could not, as a federal constitutional matter, serve as a strike, because appellant enjoyed no right to a jury trial in the juvenile court, and hence a jury did not and could not decide the facts underlying the robbery adjudication. Appellant relies on the United States Supreme Court’s holdings that a sentence may not be expanded “above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. [Citations.]” (*Cunningham v. California* (2007) 549 U.S. 270, 275.)

This contention is necessarily unavailing. Ten days after appellant filed his opening brief in this court, the California Supreme Court held directly contrary to the present contention. (*People v. Nguyen* (2009) 46 Cal.4th 1007, cert. den. (Apr. 19, 2010) __ U.S. __ [2010 WL 1525798].) That decision is jurisdictionally controlling. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

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GRIMES, J.

We concur:

BIGELOW, P. J.

FLIER, J.